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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951

No. ~~429~~ 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 729.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of Judge Abruzzo of the United States District Court for the Eastern District of New York is not officially reported but appears in the record on appeal at pages 159 to 164.

The opinion of the United States Court of Appeals for the Second Circuit written by Judge Swan is officially reported in 194 F. 2d 194 and appears at the end of the record on appeal at pages 171 to 175.

II.

Jurisdiction.

Petitioner alleges jurisdiction of this Court under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals sought to be reviewed was rendered on February 4, 1952. The action was brought under the Jones Act, 46 U. S. C. § 688.

III.

Questions Presented.

Did the Court of Appeals for the Second Circuit correctly decide that petitioner failed to prove that respondent's negligence caused the death of petitioner's intestate?

Did the Court of Appeals correctly order the direction of a verdict for respondent instead of ordering a new trial?

IV.

The Facts.

(a)

The Background.

On the afternoon of his death on April 22, 1946, Charles Johnson reported for work at Pier 39, Manhattan in the East River about 4:30 p. m. as a floatman on respondent's tug "Transfer No. 10" (R. 10).

He had been a member of the crew of "Transfer No. 10" for several months (R. 11, 47). He had worked regularly under Captain O'Brien, the master of the tug, during this period and on previous occasions (R. 11, 47). He had worked on respondent's tugs for about nine years (R. 47, 94). He was an experienced man, well qualified in his job, and a good swimmer (R. 46, 65). He was 41 years old (R. 93).

Mrs. Margaret Johnson testified initially that her husband had never been in a hospital or had any serious illness (R. 94, 98). She further claimed that he had never been away from his job with respondent on account of illness, and had never been away as much as a month for any reason (R. 98). She later admitted, after being shown Exhibit C, that he had been away a few weeks in May of 1943 on account of a hernia; for which no operation had been performed, but denied any further absence in 1943 or sickness in 1944 (R. 98-99, 120-121).

She denied having written Exhibit C, a letter dated May 31, 1943, signed with her name, stating that her husband had not been feeling well for several weeks owing to stomach trouble and had been advised by a doctor to rest for several weeks (R. 119-120). She claimed that the letter was written by her sister, Mrs. Hops, to the knowledge of herself and her husband and at the latter's direction, but that its contents were untrue and incorrect (R. 119-120).

The employment records kept in the regular course of respondent's business, which were produced in court, showed that in addition to other occasions Johnson was away from his work on account of sickness May 17 to August 14 and December 17 through 31 in 1943 and October 8 to December 8 in 1944 (R. 121-128).

Captain O'Brien was in sole charge of the tug and its crew (R. 50-51). He had held a master's license 19

years and had worked on tugs for respondent 26 years. (R. 65). His deck force consisted of a first and second deckhand and a floatman (R. 10). Below decks were an engineer, a fireman and an oiler (R. 10).

"Transfer No. 10" first took a loaded carfloat from Pier 39 to Bridge 5 of the floatbridges at respondent's Oak Point yards in the Bronx (R. 11-12). Johnson carried out his usual duties for this movement (R. 12, 48). The tug then moved about 70 feet to a place called "The Hole" to take on water and await the next move (R. 12-13, 48-49). Orders then were given for the tug to remove two empty carfloats from Bridges 11 and 12 and to tie them up about 500 feet away outside Pier 3 at the Church E. Gates Dock (R. 13, 49-50, 60).

"Carfloat 53" was in Bridge 11 and "Carfloat 58" in Bridge 12, each lying bow in and stern out (R. 14-17). They were 340 feet long and 40 feet wide, with about five feet of freeboard (R. 42, 71, 24). Tug "Transfer No. 10" had a glass-enclosed pilot house the floor of which was about ten feet above the deck of the tug and carfloats (R. 52).

The floatbridges, carfloats, and tug are shown in Exhibits 1, 2, A, and B. The upper half of the tug can be seen in Exhibits 1 and 2 (R. 56-57). "Carfloat 53" in Bridge 11 is pictured in Exhibit 1, while "Carfloat 58" just outside Bridge 12 is shown in Exhibit 2 (R. 14-15). Between Bridges 11 and 12 was a short rack, so labeled in ink in Exhibit 2, which was about 50 to 60 feet long and which is shown in Exhibits 1, 2, and B (R. 19, 28, 58). On the outer sides of Bridges 11 and 12 were long racks, which extended out much farther than the short rack (R. 59). They are partly visible in Exhibits 1, 2, and B, the one in Bridge 12 being so labeled in ink in Exhibit 2 (R. 19). A stair, visible in Exhibit A, led down into the water from each bridge, and a person in the water could at any

stage of the tide either mount the stair or walk ashore under the bridge structure (R. 65-66).

Carfloats were held secure in floatbridges by rack lines, which belonged to the racks not the carfloats (R. 22-23, 67). Near the bow of each carfloat a short rack line, marked "R" in ink in Exhibit 2 and unmarked in Exhibit 1, made the float fast (R. 18-19). Toward the stern of each carfloat a long rack line made it fast (R. 22).

Usually a bridgeman, if any were ordered to a bridge, would stand on the long racks and from there would release the long rack lines by throwing them off and hauling them up, and a floatman on the carfloats would release the short rack lines (R. 16-17, 20-23, 67). In the absence of a bridgeman, the floatman would release the long rack lines (R. 68). A bridgeman would not be supposed to go on carfloats to release the short rack lines, since this was not part of his duty (R. 92). Normally, after releasing the long rack lines, a bridgeman would go to his next assignment in the yard (R. 92). After the floatman had released the last line he would customarily indicate that fact by shouting "all gone" to the captain in the pilot house to let him know the floats were ready to be moved (R. 68). The captain then would sound a slip whistle and start to pull the floats out (R. 46, 70). The floatman would stay where he was at the bow of the carfloat preparatory to securing the bows of the carfloats together by cross-lines after they had been pulled clear of the short rack and had come together (R. 26, 70).

(b)

The Accident.

When "Transfer No. 10" went to take "Carfloats 53" and "58" out of Bridges 11 and 12, it was clear and still light and the tide was ebbing (R. 13, 26, 58, 60). The captain was in the pilot house steering the tug (R. 17).

The bow of the tug was placed against the port stern quarter of "Carfloat 53" and secured there by Gaglio, the first deckhand or mate, who left the tug and went onto the float with the bow line (R. 17). The position of the tug at this point is shown in Exhibit 1 (R. 56). Santalesa, the second deckhand (who died before the trial), remained at the bow of the tug to tend the bow line (R. 25, 31, 46). Gaglio went to the stern of "Carfloat 53" preparatory to securing the sterns of the two floats with a line as soon as the tug could push them together (R. 17-18, 25, 56). Johnson followed Gaglio off the tug and proceeded toward the bow of "Carfloat 53" in order to release the short rack lines (R. 18).

Johnson was last seen alive by any one as he walked along "Carfloat 53" after getting off the tug (R. 20-21, 25, 52). He was to have released the short rack line in Bridge 11, gone ashore to get to Bridge 12, released the short rack line in Bridge 12, shouted "all gone", and then stayed there to make fast the bow cross-lines (R. 20-23, 26, 68, 70, 92).

After Gaglio had fastened the sterns of the carfloats together, he returned to a place on "Carfloat 53" next to the bow of the tug and carried the bow line in his hand in order to shift it as the tug maneuvered to get into position to pull the floats out (R. 27-28, 60). On account of the short rack, neither he nor Captain O'Brien could see the port bow corner of "Carfloat 58", where Johnson was supposed to release the short rack line of Bridge 12 (R. 28, 68). The view they had is shown in Exhibit B (R. 69). Neither Gaglio nor O'Brien saw any bridgemen at any time (R. 42, 68). Both heard some one up forward shout "all gone", but neither could positively identify the voice as that of Johnson (R. 29, 55-56, 59). Captain O'Brien normally could not recognize a voice 300 feet away, the distance Johnson was if on the bow of "Carfloat 58" (R. 64-65, 71). When he heard

the "all gone", he could see the bow line and all the rack lines except the short rack line of Bridge 12, and he noticed that all the rack lines he could see were released (R. 28, 70). He could see Gaglio but not Johnson (R. 26, 68).

After O'Brien determined from the "all gone" signal that the carfloats were ready to be pulled out, he sounded a slip whistle as notice to every one that the floats were about to move, and then commenced gradually to move them (R. 46, 57, 70-71). They came out without any trouble, as the tug backed them out on a line (R. 33-34, 70). The tug shown in Exhibit 2 is pulling the floats out but its bow is headed out instead of in as "Transfer No. 10's" was (R. 57). O'Brien later learned that the short rack line of Bridge 12 had in fact been unloosened before the tug started back (R. 70). O'Brien's procedure on this occasion was the same as it always had been (R. 91-92).

O'Brien was busy maneuvering his tow and watching for river traffic as he pulled the floats out (R. 68). He first noticed that Johnson was not on "Carfloat 58" when he was in the river clear of the long racks with his tug moving ahead (R. 59-61). He asked Gaglio where Johnson was, but Gaglio did not know (R. 60). He then told Gaglio to fasten the bow cross-lines and proceeded to take the floats to Pier 3 (R. 60).

To have taken the floats back into the bridges would have involved turning them around, putting three lines out, and maneuvering them back in against the ebb tide (R. 71-73). O'Brien estimated that it was quicker to go forward as planned, leave the carfloats at Pier 3, and return light than to place them back in the bridges (R. 71-73). What he did took about 25 minutes (R. 40, 61).

At no time while the carfloats were being moved was anything unusual heard or seen, any commotion noted,

or any splash or call of any kind heard (R. 46, 71). The engine crew were at all times below deck (R. 72).

Coming into "The Hole" after leaving the floats at Pier 3, O'Brien sounded three short whistles as a signal for Johnson to rejoin the tug (R. 41, 62). When Johnson did not appear, O'Brien sent Gaglio ashore to look for him (R. 41, 62). Gaglio looked in the bridgemaster's office, the locker room, and the rope shanty (R. 41, 43, 62). Gaglio reported back to O'Brien that he could not find Johnson and was then ordered to look around the floatbridges (R. 44, 62). Gaglio finally discovered something floating in Bridge 12 and reported this to O'Brien (R. 44, 62). O'Brien directed Gaglio to get a boat hook and a heaving line, and then they went together to Bridge 12 (R. 45, 63). They lowered the bridge apron and hauled from the water what turned out to be Johnson, who was floating about three feet from the apron (R. 45, 63). It was about dusk (R. 43, 63).

Attempts to revive Johnson by artificial respiration produced no response or results (R. 45, 71). Some froth or bubbles appeared on his lips but no water was gotten from him (R. 46, 71-72). Both O'Brien and Gaglio looked Johnson over closely but saw no cuts, bruises, or other marks on him (R. 46, 63). At the funeral parlor, Mrs. Johnson and her daughter Audrey claimed to have noticed scrape marks on his forehead (R. 96-97, 101).

(c)

Custom and Practice.

Captain Holmes, called as an expert witness by plaintiff, claimed that the common custom and practice in New York Harbor for a tug captain after receiving the "all gone" signal (which meant his carfloats were ready to be moved) and before moving his carfloats was to see the

man who released the last line, to recognize his voice if he could not be seen, or, failing these two, to send some one to see the man for him (R. 79-81, 90-91). If cars were on the carfloats, the captain might have to send some one about 300 feet all the way to the bow of a carfloat to see who called "all gone" (R. 90-91).

Captain Holmes, now retired, had been a tug captain for the Pennsylvania Railroad from 1914 to 1944 moving carfloats in New York Harbor (R. 75). His experience with other railroads was extraordinarily limited. He had been once to the New York, New Haven and Hartford Railroad's floatbridges at Oak Point in 1934 (R. 87). He had been several times to the floatbridges of the Erie Railroad and the Central Railroad of New Jersey in Jersey City, the last time being in 1940 (R. 88). He was principally familiar with the floatbridges at Bay Ridge and Greenville, which railroads other than the Pennsylvania Railroad do not use (R. 88). The other floatbridges which he had been to were pontoon bridges or single-float bridges, not like those at Oak Point (R. 87-88).

He admitted that when he was at floatbridges he was not interested in the way things were being operated and did not wait around to see them (R. 89). In his entire career he had only several times seen a captain send a man to locate the position of his floatman before pulling his floats out (R. 89). One of these occasions was at the floatbridges of the Central Railroad of New Jersey some time between 1924 and 1940 (R. 90).

Captain DeMars, testifying as an expert witness for defendant, stated that the common custom and practice in New York Harbor was to operate as Captain O'Brien did, not as Captain Holmes did, and specifically denied the existence of any such practice on the Pennsylvania Railroad as Captain Holmes described (R. 106-108). Captain DeMars had been a tug captain handling carfloats

for the Pennsylvania Railroad for ten years and had had wide experience in towing throughout New York Harbor for many years (R. 105-106, 111). He pointed out that customarily "all gone" means that the last line is off, that no signal is given until the last line is off, and that the floatman not the bridgeman normally shouts "all gone" (R. 111-114).

V.

The Court of Appeals for the Second Circuit correctly held that petitioner failed to prove that respondent's negligence caused Johnson's death.

The Court of Appeals unanimously determined that there was a complete absence of probative facts to support the conclusion that respondent's negligence caused Johnson's death (R. 175). A study of the facts amply confirms this determination.

The record is bare of any evidence to show what happened to Johnson from the time he was last seen heading toward the bow of "Carfloat [illegible]" until he was fished out of the water over half an hour later at Bridge 12. There is no proof to show when, how, or why Johnson ended up in the water. To demonstrate that respondent's failure to follow the custom and practice described by Captain Holmes was the proximate cause of Johnson's death, one must build up by a series of inferences unsupported by any facts a possible sequence of events that might conceivably have happened. In so doing, one must discard other more probable explanations and rely entirely on one's imagination.

The fact that no call, splash or other unusual thing was heard or seen by those present makes it unreasonable

to infer that Johnson got into the water until after the carfloats had been removed from Bridges 11 and 12. As Captain DeMars testified, there was nothing surprising about a floatman staying ashore after releasing the last line when the work could be done without him and the tug was engaged in the vicinity in slip service (R. 109).

The fact that Johnson was a good swimmer and could easily have gotten ashore safely by wading out or walking up the floatbridge stairs makes it probable that he fell into the water because of a heart attack, a brain hemorrhage, or other physical seizure. Examination of his body when it was first taken out of the water revealed no superficial physical cause for a fall or for his failure to rescue himself. Since artificial respiration drew no water from his lungs, he probably had ceased breathing before he entered the water. He had been seriously ill in 1943 and 1944.

The fact that the "all gone" signal was given makes it logical to assume that Johnson was ready for the carfloats to be moved and was in a safe position for the move. He was an experienced, well qualified floatman. He had worked with Captain O'Brien for the last three months and on prior occasions. He knew that customarily the floats would be moved after the "all gone" signal. He knew that O'Brien and the man who released the last line could not see one another. It was the duty of no one but himself to release the last line. If he did his job as a person in his position should have, he clearly would not have called out "all gone" if he were unready for the move and would have shouted out if for any reason he became unready after giving the signal.

Although bridgemen, if ordered to a bridge, usually release the long rack lines, none was seen on this occasion, and the floatman will do so in their absence (R. 16-17, 22, 42, 67-68). If Johnson not the bridgemen released the long

rack lines, he was not observed to do this by Captain O'Brien or Gaglio because they were busy getting the sterns of the carfloats pushed together and made fast together and shifting the tug and its headlines (R. 17-18, 25-28, 56). Even if it be assumed that bridgemen released the long rack lines on this occasion, they would have left the vicinity for their next assignment in the yard well before the carfloats were moved (R. 92).

It is clear that it was no part of the bridgemen's duty to go upon the carfloats or to release the short rack lines, which had to be released from the carfloats (R. 20, 92). Indeed, it is not disputed that Johnson released the short rack lines, which it was his duty to do. At the time the "all gone" signal was heard, Captain O'Brien could see all the rack lines except the short rack line of Bridge 12, and he noticed that the ones he could see were all released (R. 70). Only one "all gone" signal was given. Consequently, the "all gone" signal could have pertained only to the short rack line of Bridge 12, which was in fact released (R. 70). Since it was Johnson's duty to give the "all gone" signal upon releasing the short rack line of Bridge 12, one can only conclude from the available evidence that he in fact did give the signal. No one else was concerned with giving the signal or in a position to do so; no one else had any right or duty to do so.

Petitioner tries to becloud this conclusion by suggesting a variety of remote possibilities. She argues that O'Brien and Gaglio would have recognized Johnson's voice if he called "all gone". Admittedly they were both over 300 feet away from Johnson, and were not concerned with identifying the voice they heard. Captain O'Brien stated positively that he could not recognize a person's voice at that distance (R. 65, 71). Even Captain Holmes agreed that this was so (R. 81). The fact that O'Brien could not recognize a voice at 300 feet, that it was his custom to start to move after hearing "all gone" (R. 55), and that

his method of work on this occasion was the same as it had been for 19 years (R. 91-92), refutes the statement in the trial court's opinion that "there was no proof offered that Captain O'Brien in previous movements pulled out of a slip without recognizing the voice of his own crew" (R. 162).

Petitioner points to Gaglio's testimony that a bridgeman hollers "all gone" when he releases a line (R. 45), and argues that a bridgeman did so in this case. Gaglio corrected this statement, however, by indicating that a bridgeman if he called would holler "all gone port" or "all gone starboard" (R. 45-46). It is clear from both the expression itself as well as from the testimony of Captains O'Brien, Holmes and DeMars that "all gone" means just what it appears to mean, namely, that all the lines have been released and the carfloat is ready to be moved (R. 68, 80, 114). A bridgeman is not in a position to see if all the lines are released and so would never call "all gone". In any event, since all lines but Johnson's had been released before the "all gone" was called, it could refer only to the release of his line when it was called and it could mean only that his line and all others were released. Petitioner says that Captain O'Brien declared that a bridgeman may possibly holler "all gone". Of course, almost anything is possible, but Captain O'Brien pointed out that the bridgemen move on to their next assignment as soon as they release their lines and they are not supposed to go onto a carfloat (R. 92), while Captain DeMars said that the floatman gives the "all gone" signal and the bridgeman does not give a signal at all (R. 113). No reason suggests itself for a bridgeman to call "all gone" when he cannot see if all the lines are released and it is not his duty to do so.

The fact that the short rack line of Bridge 12 was released not broken, considered with the lack of any evidence of any defect in "Carfloat 58" and its equipment

or of any disturbance thereof or mark thereon and considered with the positive evidence that the floats were pulled out gradually without any trouble, further negates the theory that respondent's failure to adhere to the custom and practice described by Captain Holmes could have had anything to do with Johnson's death. Nor is there the least basis for concluding that the observance of this practice could have prevented the misfortune which overtook him. Whatever was the true cause of Johnson's death, petitioner failed entirely to prove it, and on that issue petitioner had the burden of proof.

It has long been held, even in actions under the Federal Employers' Liability Act, that the rule against speculative verdicts prevents a jury from selecting one of several possible causes of an accident as a basis for fastening liability on a defendant.

Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333 (1933);

N. Y. Central R. Co. v. *Ambrose,* 280 U. S. 486 (1930).

The rule against resting verdicts on surmise and conjecture was recently reaffirmed in *Moore* v. *Chesapeake & Ohio R. Co.,* 340 U. S. 573 (1951), where this Court in a death action under the Federal Employers' Liability Act pointed out that even if the jury disbelieved the testimony of the only eyewitness as to how decedent fell from the engine, this merely left the jury with no evidence of how he fell, and under such circumstances it would be purely speculative for it to infer that he fell because of defendant's negligent operation of the engine.

In numerous railroad cases involving employees who fell into the water or under trains without eyewitnesses to establish the cause of their deaths, the complaint

has been dismissed or a defendant's verdict directed for failure to establish that defendant's negligence was in whole or in part the proximate cause of the death.

Northwestern Pac. R. Co. v. *Bobo*, 290 U. S. 499 (1934);
Atchison, T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458 (1932);
Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351 (1930).

Recent decisions on similar facts hold likewise:

Healy v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935, reh. den. 71 Sup. Ct. 620;
West v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810;
Boston & M. R. Co. v. *Coppellotti*, 167 F. 2d 201 (1st Cir. 1948);
Trust Co. of Chicago v. *Erie R. Co.*, 165 F. 2d 806 (7th Cir. 1948), cert. den. 334 U. S. 845.

The rule against speculative verdicts was clearly explained in the last-named case, where the court said (p. 809):

> "One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was that the defendant did that was negligent and caused the accident."

The present case presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well settled rules to the particular facts is involved. It is not within the proper business of this Court to review cases important to the parties but not to the operation of a federal system.

The mere fact that this action was brought under the Jones Act gives it no special standing that calls for a review. This Court has frequently denied certiorari in cases under the Federal Employers' Liability Act where the court has dismissed a plaintiff's case and taken it from a jury. Note, for example, the following:—

Beamer v. *Virginian R. Co.*, 321 U. S. 763;
Cowdrick v. *Penn. R. Co.*, 323 U. S. 799;
Negro v. *Boston & Me. R.*, 324 U. S. 862;
Fantini v. *Reading Co.*, 325 U. S. 856;
Scarborough v. *Penn. R. Co.*, 326 U. S. 755;
Chisholm v. *Reading Co.*, 329 U. S. 807;
Waller v. *Northern P. T. Co.*, 329 U. S. 742;
Wolfe v. *Henwood*, 332 U. S. 773;
Lasagna v. *McCarthy*, 332 U. S. 829;
Trust Co. of Chicago v. *Erie R. Co.*, 334 U. S. 845.

Many like cases could be cited under the Jones Act, such as *Glover* v. *Compagnie Generale Transatlantique*, 308 U. S. 550; *Miller* v. *Browning S. S. Co.*, 334 U. S. 834; and *West* v. *Eastern Transp. Co.*, 340 U. S. 810.

The cases cited by petitioner are merely cases in which on their particular facts it was held that a jury question was presented. On the unique facts of the case at bar, no such question can be found on the issue of causal connection.

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VI.

The Court of Appeals for the Second Circuit was correct in ordering that a verdict for respondent should have been directed, rather than ordering a new trial.

Petitioner argues that the Court of Appeals had power only to order a new trial, not to order a directed verdict for respondent. Petitioner's argument assumes that respondent failed within ten days after the verdict to move under Rule 50(b) to set aside the verdict and any judgment entered thereon and to have judgment entered in accordance with its earlier motion for a directed verdict.

Rule 50(b) provides as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was

returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Right after the verdict was brought in, respondent made such a motion as was required by Rule 50(b), when it moved to set aside the verdict as "contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). Decision on this motion was reserved.

While the language of this motion was not taken literally from Rule 50(b), its purpose was clearly to have the trial court set the verdict aside and either direct a verdict for respondent because the verdict brought in was as a matter of law unsupportable and without sufficient evidence to support it or to grant a new trial because the verdict was against the weight of the evidence and excessive.

Even were petitioner's contention in this respect accepted, petitioner overlooks the further fact that the trial court reserved decision both on respondent's motion to dismiss at the close of petitioner's case and on its motion for a directed verdict at the close of all the evidence (R. 102, 105, 133, 134).

Ever since *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935), it has been established that the reviewing court may order a directed verdict instead of a new trial where decision on the motion for a directed verdict was reserved, even though no motion was made after the verdict was brought in. The Court of Appeals for the Second Circuit has since then followed that practice and even praised it.

Limbershaft Sales Corp. v. *A. G. Spalding and Bros.*, 111 F. 2d 675 (1940).

See *Fratta* v. *Grace Line, Inc.*, 139 F. 2d 743, 744 (1943).

Nothing in the cases cited by petitioner suggests a contrary rule. They deal only with the situation where no decision was reserved on motions made prior to the verdict and thereafter no motion of any kind was made or only a motion for a new trial was made.

CONCLUSION.

For the reasons advanced above, it is urged that this Court should refuse to grant review by writ of certiorari.

Respectfully submitted,

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